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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE,
Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

Memorandum of Respondent United Steelworkers of America, AFL-CIO In Opposition to Suggestion of Mootness

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Respondent Bowman Transportation, Inc. suggests that this case has become moot. We disagree.

This case was brought on a complaint alleging racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964. It was properly certified as a class action by the district court. Intervenor Lee was named to represent a sub-class consisting of black applicants for positions as over-the-road drivers. The claim asserted on behalf of the members of this sub-class was that they had been denied such positions on the basis of race. After the full litigation of this claim, the district court found that the members of this sub-class had in fact been

victims of racial discrimination in hiring. As part of the remedy for this discrimination, the district court ordered that the members of this sub-class be given immediate priority in hiring. The district court refused, however, to order that, upon being hired, these members of the sub-class be given seniority back to the date they were denied employment on the basis of their race. This denial of seniority relief was appealed to the Fifth Circuit, but to no avail. The issue has been brought to this Court. As we now show, though the named sub-class representative, Lee, has subsequent to the class certification lost his personal stake in the resolution of this issue, the case is not moot.

The question of seniority relief remains "real and immediate" for those sub-class members now employed by respondent Bowman. Put succinctly, they have suffered a wrong; they have reasonably relied upon this lawsuit to provide full vindication for that wrong; to abort this case now would prolong the period of their suffering, might well jeopardize their ability ever to obtain their full measure of relief, and at least would result in redundant litigation. The decisions of this Court, as we read them, do not call for such a senselesss result.

1. This case as it now stands does not involve "conjectural" or "hypothetical" issues or people. *Cf. O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969). It involves employees who have in the course of this very litigation been adjudged victims of racial discrimination, and who now have a real stake in securing a remedy for that discrimination.

When the instant lawsuit was filed and then certified as a class action, these employees (then rejected applicants), as class members, were entitled to rely upon it as the vehicle for asserting their claims of employment discrimination. Their stake in this litigation was from the beginning quite substantial: If the suit were successful, they would reap

substantial benefits; if it were lost, they would be bound by that result. Rule 23(c)(3) of the Federal Rules of Civil Procedure. Precisely because of their interest, the suit could not have been settled or dismissed by the named litigants without approval of the court. Rule 23(e).

In fact, the suit was at least partially successful: The members of the sub-class were found to be victims of unlawful racial discrimination, were afforded the opportunity to secure jobs, and were awarded back-pay. However, they were refused by the lower courts—and seek in this Court—the additional seniority which they would have had but for the unlawful discrimination: their "rightful place." The significance of this additional seniority for each employee in the class is discussed at length in our brief on the merits at 24-29. As each day passes without that relief, these employees continue to suffer the effects of the past discrimination in ways that would not fully be compensated by an eventual award of back-pay: they must work the less desirable jobs to which they are relegated by their inferior seniority status.

Having come this far in the litigation, it is now suggested that these employees must start over if they want to claim the full relief to which they are entitled. Would they have to run the gamut of filing new charges with the Equal Employment Opportunity Commission? Would they confront statute of limitations problems? Even if they surmounted these hurdles, they would confront a dispositive precedent of the Fifth Circuit that bars the granting of the seniority relief they seek. Ultimately, only this Court can resolve their claim. Yet, though the class members are presently suffering the effects of their seniority disadvantage, Bowman would have them begin anew and wait several years more before securing relief.

2. Bowman's suggestion that this Court may not now resolve this claim relies on the mechanical application here

of a rule fashioned by this Court to apply to a distinct type of case. Thus, Bowman cites the following language in this Court's decision in *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (1975):

> ". . . [I]t seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue. The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23, a controversy still exists between petitioners and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review."

Bowman relies on the portion of that quotation apparently requiring that the issue be "capable of repetition yet evading review." This "element," we are told, is not met here. We disagree that this "element" has application here.

Since the language relied upon by Bowman was *dictum* in *Jacobs*, we pass to a consideration of *Sosna* v. *Iowa*, 419 U.S. 393 (1975), from whence this language came. *Sosna* involved a challenge to a state statute requiring the petitioner in a divorce action to have been a resident of Iowa for one year immediately proceeding the filing of the action. The named plaintiff, Sosna, had filed for a divorce in state court, but her petition was denied for failure to satisfy the residency requirement. She then filed a complaint in federal court challenging the constitutionality of that requirement, and seeking both declaratory and injunctive relief. She brought the case as a class action on behalf of unnamed and unidentifiable class members "who desire to initiate actions for dissolution of marriage or legal separation, and who are barred from doing so by the one-year duration residency requirement. . . ." *Id.* at 397. This class was duly certified. A three-judge district court upheld the constitutionality of the statute. Subsequent to the district court decision but before the case reached this Court, Sosna satisfied the residency requirement (and in fact obtained a divorce elsewhere). This Court then considered the question of mootness.

The Court began its analysis by finding that,

> "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." *Id.* at 399.

This status, the Court held, is sufficient for the maintenance of a "case or controversy" within the meaning of Article III of the Constitution, provided a "live controversy" exists between the class members and a named defendant at the time of review by this Court:

> "Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to 'cases and controversies' specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402. (footnotes omitted)

See also, *Id.* at 401, n. 9.

To this point, the analysis of *Sosna* fits and is dispositive of the instant case. But the Court there also had to face a problem not presented here. Once Sosna dropped out of the case, there was in a meaningful sense no real plaintiff left—only a group of unidentifiable short term residents of Iowa who would "desire" to bring a divorce action but for

the residency requirement. In a real sense, this Court was asked to review the constitutionality of a state statute at large. On the other hand, given the length of the residency requirement, the issue would be incapable of review by this Court if the case were held moot. It was to confront this dilemma that the Court established the requirement cited by Bowman.

But this added requirement of *Sosna* has no application here. It is without meaning here to ask whether the issue is "capable of repetition"; the controversy here never went away. The same controversy remains for the same identifiable group of class members as when the case began. Far from an advisory opinion, or at-large review, this case has plaintiffs, and we know who they are.

Our analysis is confirmed by the *Sosna* Court's citation, with approval, of cases in a posture similar to ours, where courts of appeals have ruled that class actions involving the rights of identifiable groups of employees should not be dismissed as moot merely because the claim of the named plaintiff is no longer extant. *Id.* at 401, n. 10; *Moss* v. *Lane Company, Inc.*, 471 F.2d 852 (CA 4 1973); *Roberts* v. *Union Co.*, 487 F.2d 387 (CA 6 1973); *Cf. Albermarle Paper Co.* v. *Moody*, —— U.S. ——, 43 U.S.L.W. 4881, 4883, n. 8 (1975).

Respectfully submitted,

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